U.S. Department of Labor

Office of Administrative Law Judges
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In the Matter of: LEE PHILLIPS, Claimant, vs. KIRTLAND AIR FORCE BASE / AIR FORCE INSURANCE FUND, Employer/Carrier.	DATE: JULY 6, 2000 CASE NO. 1995-LHC-2353 OWCP NO. 8-99871

Appearances:

James G. Chakeres, Esq.[1]
P.O. Box 6
Santa Fe, New Mexico 87504

and

Max Hernandez, Jr.
Libertad Civil Rights Advocates
2433 Algodones NE
Albuquerque, New Mexico 87112

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[1]Mr. Chakeres petitioned to be removed as Claimant's attorney on September 22, 1999 after the hearing had concluded, and his petition was granted, providing he represent Claimant during the post-trial depositions, which he did; thereafter, Mr. Max Hernandez, a lay representative, became Claimant's representative on December 31, 1999.

For the Claimant

Charles L. Brower, Esq.
Air Force Services Agency
Office of Legal Counsel
10100 Reunion Place, Suite 503
San Antonio, Texas 78216
For the Employer

Before: Anne Beytin Torkington
Administrative Law Judge

DECISION AND ORDER DENYING COMPENSATION AND AWARDING MEDICAL BENEFITS

This claim arises under the Longshore and Harbor Workers' Compensation Act, as amended (hereinafter "the Act" or "the Longshore Act"), 33 U.S.C. §901 et seq. A formal trial was held in Albuquerque, New Mexico, on August 25 and 26, 1999. All parties were represented by counsel, and the following exhibits were admitted into evidence: Claimant's Exhibits ("CX") A-P, R-S, V-Z, AA-FF, HH-JJ,[2] LL-MM, OO, and QQ-RR; Respondent's Exhibits ("RX") 1-34, 37-48[3] and 50-53. The following exhibits were submitted post-hearing and are were admitted to the record: CXs-SS, TT, UU, VV, WW, and XX; and RX-54. References to the trial transcript will be referred to as "Tr." followed by the page number.

Stipulations: The parties agreed to, and the undersigned accepts, the following stipulations:

1. The parties are subject to the jurisdiction of the Longshore and Harborworkers'

[2]CXs-KK and Q were illegible photographs, and were therefore held in abeyance pending submission of legible ones; new exhibits with photographs, under different exhibit numbers were submitted in the course of the hearing (CX-RR) and post-hearing (CX-SS) and admitted into the record.

[3]Although provisionally accepted into the record at p.52 of the transcript, no RX-49 was ever submitted.

Compensation Act, hereinafter referred to as the Act, or LHWCA.

2. An employer/employee relationship existed between Claimant and Respondent Employer at the time of said injury.

3. Claimant sustained an injury arising out of and during the course of her employment on November 6, 1990.

4. Claimant provided Employer timely notice of said injury on November 6th, 1990,

within the meaning of Section 12 of the Act.

5. Employer timely filed its first report of injury, LS-202, on November 6, 1990.

6. Claimant timely filed a claim for compensation, LS-203, on October 5, 1993, within the meaning of Section 13 of the Act.

7. Employer filed no notice of controversion, LS-207.

8. Claimant's average weekly wage at the time of said injury was $247.38.

9. Employer paid temporary total disability from November 7, 1990 through July 27, 1993, for a total of 142 weeks at $170.54 per week, totaling $24,216.58.

10. Claimant has not received State of New Mexico disability benefits.

11. Employer has provided Claimant medical benefits pursuant to Section 7 of the Act.

12. Claimant returned to prior work with Employer on July 28, 1993, and resigned on February 11, 1994.

13. Section 8(f) is not an issue in this proceeding.

Since all of the foregoing stipulations are supported by substantial evidence of record, they are accepted. *Phelps v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 325, 327 (1984); *Huneycutt v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 142, 144 fn. 2 (1985).

Issues in Dispute:

1. Whether the job offered to Claimant by Employer after her injury accommodated her work restrictions;

2. The date of maximum medical improvement, both orthopedic and psychological;

3. Whether Claimant resigned voluntarily on February 11, 1994, or whether such resignation was a constructive discharge due to failure to provide her with a job which accommodated her limitations;

4. Whether Claimant suffered a psychological injury as a result of the injury she sustained on November 6, 1990; and,

5. Whether Respondent has paid all of Claimant's medical benefits required by Section 7 of the Act, specifically the bill owed to Dr. Traweek.

Summary of Decision

Issues 1 and 3 have been subsumed under the heading "Suitable Alternate Employment" since the issue of whether or not Employer accommodated Claimant's work restriction is more properly an issue of whether Employer provided Claimant suitable alternate employment as that term is understood under the Longshore Act. The Court finds that Claimant was offered suitable alternate employment, that to the extent her workplace needed rearrangement to allow her to work comfortably and without re-injury, Employer made such adjustments. Therefore, Claimant did not resign because she was forced to work outside of her limitations and feared or experienced re-injury. Rather, Claimant voluntarily resigned for a number of reasons that are best summarized as a personality conflict with her supervisor and co-workers.

Regarding issue 4, the Court finds that Claimant's psychological disorder is related to her injury of November 6, 1990, and is covered under the Longshore Act. Therefore, in regard to issue 5, Employer is responsible for Section 7 benefits for Claimant's psychological care, specifically monies owed to Dr. Traweek.

Regarding issue 2, the date of maximum medical improvement (physical) is February 23, 1993. However, due to surgery performed on December 21, 1999, Claimant, entered a new period of temporary total disability which is not the subject of this claim. Therefore, a date of maximum medical improvement after December 21, 1999 is not determined herein. Claimant's date of maximum medical improvement for her psychological condition is determined as October 26, 1999.

The Court does not reach Issue 6 which pertains to Section 14(e) penalties. Employer does not owe Claimant any compensation, given her ability to perform suitable alternate employment at a modified job with Employer at or above the average weekly wage she earned at the time she was injured in 1990. Therefore, Employer owes no Section 14(e) penalties.

ANALYSIS

I. Background

Claimant was 50 years old at the time of trial, and lives in Albuquerque, New Mexico. She is married and has two children. Prior to working for Employer, the positions she held were primarily secretarial. Tr. 116. She first began working at Kirtland Air Force Base in 1987 when she held the position of general clerk at the "Aero Club." Claimant worked in an office located inside a hangar.

At the time of her industrial injury, she was working as a clerk typist at the Morale, Welfare & Recreation ("MWR") Recreational Equipment Center at Kirtland Air Force Base. Claimant tripped and fell when she caught her heel in a crack in the floor on November 6, 1990. She was initially treated at the Kirtland base hospital for injury to her right shoulder and back.

Claimant returned to work on July 28, 1993 and resigned on February 11, 1994. She has not worked since. Claimant claims the Respondent assigned her to work that she was physically incapable of performing and that when her requests for change were not appropriately responded to, she attempted to obtain a supervisory position which would have been physically more suitable. When she was not selected for the position, she resigned to protect her health, as she felt continuing to perform her assigned job would cause re-injury.

II. Suitable Alternate Employment

A. Summary of Evidence

Claimant began treatment with Dr. Lloyd Hurley, a board-certified orthopedist, on December 12, 1990. As of April 15, 1991, Dr. Hurley had diagnosed "impingement syndrome right shoulder; degenerative osteoarthritis Grade III, right AC joint; facet disease L5-6, L6-S[4] with segmental instability lumbar spine." RX-3, p.25. Dr. Hurley performed a decompression of Claimant's right

[4]Presumably, Dr. Hurley indicated "S1." However, the exhibit only shows "S" and the rest appears to have been cut off in the copying process.

shoulder on May 4, 1992. RX-3, p.18.

On February 11, 1993, Tom O'Neill, MS, PT, performed a "Work Capacities Assessment" on Claimant. CX-W. While Mr. O'Neill found that Claimant "might not be able to return to a sedentary job position as a clerical or secretary due to her limited tolerance for postural positioning including either repetitive or sustained postural positions," *Id.* at 96, he also found that Claimant demonstrated "magnified illness behavior" on Wadell's testing and "symptom magnification behavior" on pain questionnaire testing. *Id.* at 94. Mr. O'Neill concluded that Claimant fit into a light labor classification with the ability to occasionally lift 22 pounds and frequently lift 15 pounds. Overhead lifting was limited to 5 pounds occasionally and 3 pounds frequently. Mr. O'Neill concluded that Claimant could walk without limitation, was unable to climb ladders, and could occasionally assume any other posture, i.e., sitting, standing, stair-climbing, trunk bending, overhead reaching, crawling, repetitive squatting, kneeling, repetitive bending and stooping, sustained crouching. Finally, Mr. O'Neill recommended that Claimant engage in a combination of biofeedback/pain management/functional restoration program.

Based on Mr. O'Neill's report, Dr. Hurley referred Claimant to Dr. Lester M. Libo, a clinical psychologist, for a program of biofeedback/pain management. Dr. Libo reported positive results over 17 sessions which ended on June 23, 1993. RX-3, pp.43-45.

Dr. Hurley found that Claimant reached maximum medical improvement on February 23, 1993. RX-3, p.21. On March 25, 1993, Dr. Hurley stated in a letter to Sandy Marshall, Claims Examiner for the Air Force, Claimant was now released to sedentary work, although he also recommended biofeedback sessions for Claimant.[5] On April 13, 1993, Dr. Hurley advised Claimant that she might return to "light activity." This was the last time Claimant saw Dr. Hurley before changing doctors. On May 4, 1993, Dr. Hurley completed a Work Restriction Evaluation, RX-3, p.42, in which he indicated that Claimant would be subject to the following limitations at work: intermittent sitting, for up to 6 hours a day; intermittent walking for up to 6 hours a day; intermittent lifting of up to 20 pounds, for up to 1 hour a day; intermittent bending, squatting, climbing, kneeling, twisting for up to 1 hour a day each; intermittent standing for up to 5 hours a day; Claimant was not to reach above the shoulder but could reach forward at the desk and open and shut file drawers. Dr. Hurley also indicated that Claimant could work 8 hours per day. *Id.*

With Claimant's release to work with limitations, Joseph Yturralde, Classification Specialist and Chief of Non-Appropriated Fund ("NAF") Personnel, consulted with Claimant's supervisor at the

[5]Presumably, Claimant was attending biofeedback sessions with Dr. Libo at the time the letter was written, or commenced them shortly thereafter. It is unclear from Dr. Libo's report.

MWR recreational center, Mr. James Payne, and visited the work site, after which he "re-engineered" her original position to accommodate her limitations. RX-9, p.76.4. The revised position description, see *Id.*, p.76.14, was sent to Claimant with a letter asking her to report to work on July 28, 1993, at 7:00 a.m. The letter indicated that she would be doing general office work and typing, as well as serving customers at the front counter, with "no lifting over 10 pounds and no reaching above the shoulder." *Id.* at 76.15.

Claimant reported for work as directed on July 28, 1993. On the same day, and the two days following, she orally complained to her supervisor, Mr. Payne, about two of her working conditions: the check-out counter was too high for her to reach and do paperwork, and the telephone on the wall behind her was too high for her to reach and answer. Tr.165-166; RX-17. Claimant put the same request in writing as a "formal request" on July 31, 1993, and submitted it to Mr. Payne. Tr.166; RX-17. Claimant made another "formal request" in writing on the same date: that she be provided with "duties that I can do that are within my restrictions," and a "designated, assigned work area, to include a desk and chair." RX-18. Claimant testified that the restrictions to which she referred in the two written notices described above, referred to Dr. Hurley's restrictions. Tr.171. Mr. Payne responded to Claimant's requests by installing a banquet table at the end of the counter, and having a platform constructed that fit behind the counter and elevated Claimant so that the relative height of the counter was now lower. In addition, Claimant was advised by Mr. Payne to not answer the phone behind the counter, but rather let others answer it, or answer the phone at a desk in the office, desk #2, see RX-30. Tr.177-178. Mr. Payne also told Claimant that nobody had a personal desk, that everyone shared the desks, so that Claimant would not be assigned a personal desk for her exclusive use. RX-19, para C.

On August 12, 1993, Mr. Larry Gehring, a rehabilitation specialist retained by Employer to assist in helping with Claimant's return to work, wrote to her attorney requesting to meet with her so he could "obtain information on her specific concerns regarding her job." RX-20. Mr. Gehring made a second request on August 26, 1993. RX-21. Claimant declined to meet with Mr. Gehring. Tr.183.

On August 28, 1993, Claimant again contacted Mr. Payne in writing and complained that he was giving her duties outside of her work restrictions as prescribed by Dr. Hurley, i.e., bending over the banquet table to fill out forms, and reaching for the phone. Tr.185-187; RX-22. Claimant also mentioned problems she was having with her co-workers.

Claimant commenced treatment with Dr. Anthony Pachelli on August 9, 1993, RX-7, and notified Employer on September 7, 1993, that Dr. Pachelli had restricted her to "no repetitive overhead shoulder motion." RX-24. Mr. Reiselt, Claimant's attorney at the time, wrote a letter to Sandy Marshall, claims examiner for Employer, and stated that Claimant did "not want to go back to see Dr. Hurley" that she and Dr. Hurley had had a "parting of the ways," and that she would now like Dr.

Pachelli as her approved treating doctor. RX-5. Dr. Pachelli was thereafter approved as Claimant's authorized treating doctor by Ms. Marshall. RX-6.

Mr. Payne responded to Claimant's August 28 and September 7 letters on September 8, 1993. He stated that Claimant's duties of answering the phone and signing customer equipment forms were within the limitations set forth by Dr. Hurley, and that Dr. Pachelli had not been approved at that time as Claimant's authorized treating doctor.[6] Mr. Payne indicated that, to make it easier, he would place a chair at the table where customer equipment forms were completed. Mr. Payne invited Claimant to contact Mr. Gehring or Mr. Yturralde if she felt her physical condition needed re-evaluation. RX-25.

During this time frame, Claimant was seeing Dr. Mary Ann Conley, a psychologist, for treatment for pain. Claimant presented Dr. Conley with suggestions for changes in her workplace that would better accommodate her restrictions. Tr.210-213. As a result, Dr. Conley, who relied solely on Claimant's representations, Tr.217, wrote a letter to her attorney, Mr. Reiselt, in which she outlined suggestions for changes in Claimant's workplace. Mr. Reiselt suggested to Claimant that she see if Dr. Pachelli might approve the suggestions, since Dr. Conley was not a medical doctor. Dr. Pachelli stated in his treatment note of December 22, 1993, that Claimant could "work at full duties essentially without restrictions but with the modifications to the work site as noted in the letter by Dr. Conley. . . . I will have follow up with this patient on an as needed basis." RX-7, p.69.

Claimant wrote to Dr. Pachelli asking him to "correct his report" of December 22, 1993, as she was "concerned that [he] . . . erroneously indicated that [she has] . . . improved to the point where [she] . . . can work without restrictions, or further treatment." RX-7, p.70. Dr. Pachelli wrote a progress note dated January 28, 1994, in response to Claimant's letter in which he stood by his original opinion:

> Ms. Phillips has written a letter to me dated January 22, 1994 commenting on my most recent report of December 22, 1994 [sic]. . . . She stated that I erroneously indicated that she had improved to the point where she could work without restrictions or further treatment. The basic issue here is that the patient has repeatedly told me that she has pain in her shoulders, back, neck and leg. She is very adamant in requesting specific work restrictions.
>
> I have reviewed my notes on the patient throughout the course of her visits with me and in particular the last examination of December 22, 1993. At that time, the patient had a full synchronous motion pattern in the left shoulder with 4+/5 strength.

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[6]However, it is noted that Dr. Pachelli's restriction of no repetitive overhead shoulder motions, was not a new restriction but was consistent with the those of Dr. Hurley.

> . . . It is my opinion that [Dr. Conley's] . . . suggestions for work site modification are appropriate. . . .
>
> It is my opinion that this patient may return to her regular job duties with the provision that the work site modifications suggested by Dr. Conley be accomplished. This is my final opinion regarding this issue.

RX-7, p.72.

Claimant never presented Dr. Conley's work modifications list to Mr. Payne, nor did she ever return to see Dr. Pachelli. Tr.223.

Since Mr. Payne was planning to retire on January 7, 1994, Claimant applied for his position as the supervisory supply clerk. RX-28.1, p.108.1; Tr.234. Claimant was not selected. Mr. Ravenell, apparently Claimant's second line supervisor, became Claimant's direct supervisor subsequent to Mr. Payne's retirement.

On January 31, 1994, Claimant began treatment with Emmett Altman, M.D. At the time, Dr. Pachelli was still Claimant's authorized treating doctor. Tr. 238-239. Following Claimant's initial visit to Dr. Altman, she delivered a letter to Mr. Ravenell dated February 1, 1994, in which she informed him that her doctor had placed her on "light duty"and in a physical therapy program.[7] Claimant requested paid leave from work to attend physical therapy. Claimant also requested assignment to light duty and suggested return to her original clerk-typist position with less "Rec Aid" functions at the counter. RX-27, p.107. Mr. Ravenell responded on February 3, 1994 stating that Claimant was already in a "light" clerical position without any heavy physical requirements, that her request for leave for physical therapy was granted, but that she would have to use sick leave, then leave without pay when her sick leave was exhausted. RX-28, p.108.

On February 11, 1994, Claimant resigned her position, stating the reason as "unlawful employment practices" which:

> unreasonably denied [her] accommodation as an otherwise qualified handicapped employee; the safety hazards, which caused and continue to exacerbate, injuries to my back, neck, and shoulders, hip and right leg, continue to exist, despite complaint to Brig Gen Tattini, Col Sanchez, Col Tooley, and Secretary of the Air force Sheila Widnall: work assignments are

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[7]Nothing in Dr. Altman's records indicates that he recommended Claimant be placed in light duty status, although he did prescribe physical therapy. RX-8.

> contrary to the orders of my treating physicians;[8] rehabilitation and compensation are intentionally being prevented at all levels; I am denied light duty prescribed by my physician; I am subjected to intentional infliction of emotional distress, and daily harassment by co-workers; I am being subjected to a demeaning and humiliating work environment.

RX-29, pp.110-111; Tr.244. On the same day, Claimant filed an Equal Employment Opportunity ("EEO") complaint alleging that she was discriminated against when she was not selected for the supervisory supply clerk position. Tr.244-45.

Claimant saw Dr. Altman for the second and last time on May 25, 1994, at which time she brought in an MRI that had been ordered.[9] Dr. Altman found the MRI to be "within normal limits." RX-8, p.76. According to Claimant's testimony, she then treated with Kirtland Air Force Base doctors until commencing treatment with Dr. Thomas G. Cohn, a specialist in physical medicine and rehabilitation, CX-MM, on May 25, 1995, Tr.374, more than a year after she had resigned her position with Employer. Dr. Cohn has been Claimant's treating doctor ever since. It should be noted that Dr. Cohn signed declarations prepared by Claimant, Tr.99, which stated that Employer did not accommodate Claimant and made her work outside of her restrictions. However, at the hearing, Dr. Cohn testified that he had never visited the work site and was not in a position to know what had actually happened at the time Claimant alleges Employer made her work outside of her restrictions. Tr.91-93.

Claimant re-applied for the supervisory supply clerk position in or around June or July of 1996, Tr.376, but was not selected.

Larry Oates

Mr. Oates has worked for the Air Force since 1956. He worked in the same office as Claimant from October 18, 1993 until January 30 or 31, 1994. At the time he worked there, he had been notified that he was going to be fired; ultimately, he was demoted rather than fired, and then reinstated to his prior position after a hearing before the Merit Systems Protection Board. He signed a statement on January 14, 1994, prepared by Claimant (he presumed) which is found at CX-P and states that Claimant

> has not been assigned typing or filing duties, has not been given bank deposits to do, or any

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[8]Claimant testified that the "treating physicians" she was referring to were Drs. Hurley and Pachelli. Tr.246.

[9]Dr. Altman does not specify what area of Claimant's body was imaged.

work in the secretarial area, except answer phones. Instead I have seen her consistently work at the equipment checkout, issuing rental equipment to customers. Supervisor, and co-workers make bank deposits, distribution, and typing. I saw Ms. Phillips clean out files that should have been done before she returned from disability. I have seen her do most of the work while others ignore the customers. She is treated different from the rest of the employees; and excluded by supervisor, and co-workers from work discussions.

She has been made fun of by her co-workers, and supervisor, she is isolated from the normal supervisor, co-worker working environment. Her supervisor speaks to her in a very rude manner, and puts her down in front of other employees, and customers. Other employees' birthdays are celebrated, but Ms. Phillips' was ignored; an example is a planned celebration for employees this month, to include employees from another building. I have also seen that she has not been accomodated [sic] for her work related injuries.

I, Larry Oates know that Col. Elliot is aware that Ms. Phillips has filed discrimination complaints. He gave away the position Ms. Phillips was given in a settlement agreement; and in fact when she was ordered to return to work to the present job, it was with the understanding, it would be unsuitable for her, and cause her to resign.

CX-P, p.84.

Mr. Oates signed a declaration for an EEO investigator dated March 9, 1994, CX-TT (Exhibit 3), was deposed by Claimant's attorney on May 1, 1997, CX-TT, and testified at the hearing in the instant case. In his testimony at the hearing, he recanted the above statement except for the assertion that he had overheard Mr. Yturralde tell Mr. Payne that they were going to send Claimant a letter to come back to work (at the time she was off on worker's compensation) knowing she was out of town and therefore would probably not return to work. Tr.603-604. Mr. Oates explained that at the time he signed the above statement he was upset with the Air Force because he had been put on notice that he would be fired: "At the time, you know, I didn't agree with anything the Air Force was doing. . . . And so I probably would have just about signed anything." Tr.584. Based on Mr. Oates's recantation at the hearing, as well as the many equivocal remarks he made in his deposition[10] and

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[10]See, e.g.:

CX-TT, p.31: Q: Do you have any information, that you can tell me about today, that would lead you to believe that Mr. Payne or anybody in the Air Force administration did not accommodate Lee for her injuries with respect to the job she was given in July of 1993?

A: I Don't know what all accommodations were supposed to be, so I

declaration to the EEOC,[11] it is clear his testimony is not reliable and therefore cannot be considered in rendering this Decision.

Ken L. Williams

Mr. Williams testified on behalf of Claimant. He is a vocational rehabilitation consultant and/or vocational consultant. Tr.293. He has been doing vocational rehabilitation for 25 to 30 years, and has done forensic vocational work for 15 years. He has testified in various courts, including numerous times as a vocational expert at social security hearings. Tr.294.

Mr. Williams evaluated Claimant on August 28, 1998. CX-II. The evaluation consisted of interviewing Claimant, reading medical reports and/or notes sent to him by Claimant's attorney (who was then representing her in a social security disability proceeding) and testing. All job history and descriptions of jobs she performed were obtained from Claimant. Tests consisted of the Shipley

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wouldn't know.

Id. at 40:
Q: You didn't know anything about Lee's restrictions, did you, when she returned?
A: I never read her restrictions, so I'm sure I couldn't sit here and say what all of them were.
. . . .
Q: Who told you whatever knowledge that you had?
A: I got it from Lee. Her supervisor never told me.

Id. at 47:
Q: You agreed with the statement that her supervisor speaks to her in a very rude manner?
A: Yes. Jim [Payne] speaks to everybody in a rude manner. That's his personality.

Id. at 48:
Q: There is a statement here that says, "Other employees' birthdays are celebrated, but Ms. Phillips' was ignored."
A: I don't know if her birthday was ignored so much. If I'm not mistaken, I don't think she was at work on her birthday.

[11]See, e.g., CX-TT, p.3 of Exhibit 3: "I have no direct knowledge of whether Ms. Phillips requested specific accommodations from management that were or were not accomodated."

Institute of Living Scale, the Wide Range Achievement Test/3, the APTICOM Aptitude Test Battery, the Beck Depression Inventory-II, the Purdue Pegboard, and the Minnesota Rate of Manipulation Tests. *Id*. at 113. Psychological records reviewed included one by Dr. Michael G. Demsey, M.D., a board-certified psychiatrist, the November 29, 1993 letter signed by Dr. Conley about work site accommodation (RX-50), and two progress notes and a mental questionnaire authored by Dr. Traweek. Mr. Williams did not review any records from Dr. Conley, Dr. Saslawsky or Dr. Libo. To evaluate Claimant's medical restrictions, Mr. Williams reviewed six treatment reports from Dr. Cohn (out of a total of 48), Tr.324-31. Mr. Williams did not see any of the other medical records, i.e., from Kirtland Base Hospital, Veterans Administration, Dr. Hurley, Dr. Pachelli, or Dr. Altman. Mr. Williams admitted on cross-examination that he did not evaluate Claimant's disability during the time she returned to work at Employer, from July 28, 1993 to February 11, 1994.

Mr. Williams concluded that Claimant had "lost access to 100% of the labor market, and has experienced this loss since February 11, 1994. . . . [and would] remain in this status until there is a satisfactory resolution to the medical and psychological problems." CX-II, p.116. Mr. Williams saw Claimant again for follow-up at the request of her attorney, Mr. Chakeres, on August 19, 1999, six days before the trial in this case. He went over his 1998 report with Claimant to find out if anything had changed, determined that it had not, and reiterated at trial his belief that his 1998 analysis was correct. Tr.298.

B. Legal Analysis

Employer provided Claimant a job at the point her treating doctor determined she could return to work with certain restrictions. The parties dispute the suitability of that employment, and whether or not Claimant was forced to resign because she was required to work outside of her medical restrictions.

Section 2(10) defines disability as "incapacity because of injury to earn the wages which employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. §902(10). Thus, disability under the Act is an economic concept, based on a medical foundation. *Owens v. Traynor*, 274 F. Supp. 770 (D. Md. 1967), *aff'd*, 396 F.2d 783 (4th Cir.), *cert. denied*, 393 U.S. 962 (1968).

In cases involving disputes over an injured worker's post-injury wage-earning capacity, the burden is initially on the claimant to show that she cannot return to her regular employment due to her work-related injury. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327 (9th Cir. 1980); *Trask v. Lockheed Shipbuilding Co.*, 17 BRBS 56, 59 (1980). If it is shown that a claimant cannot return to her past job due to a work-related injury, the claimant is presumed to be totally disabled unless the employer is able to successfully demonstrate the existence of suitable alternate employment

for the claimant in the geographical area where the claimant resides. *See, e.g., Bumble Bee , supra*, at 1327; *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194 (9th Cir. 1988). If an employer offers the claimant a job at her pre-injury wages, there is no lost wage-earning capacity and the claimant is therefore not disabled. *Swain v. Bath Iron Works Corp.*, 17 BRBS 145, 147 (1985).

Claimant's basic allegation is that she was required to work beyond her physical restrictions as prescribed by her doctors (Hurley and Pachelli). After a thorough review of the evidence, the Court finds that Employer provided Claimant work that was within her restrictions, and when she complained about a specific task that caused her pain or discomfort, Employer altered her work environment to better accommodate her. Claimant specifically testified to a list of items which she believed illustrated Employer's failure to accommodate her, or in the language of the Longshore Act, did not allow her to work at suitable alternate employment. The undersigned will evaluate each of Claimant's specific claims that the position she held with Employer from July 28, 1993 to February 11, 1994 was work outside of her medical restrictions and thus was not suitable alternate employment.

1. **The bulletin board was too high.** Claimant admits that this complaint was never in her formal notices to Mr. Payne. Claimant also testified that she "accommodated herself" by asking others to post bulletins, so in effect, this was not a problem, and Claimant was never compelled by Employer to work outside of her restrictions.

2. **The phone was too high.** Mr. Payne told Claimant not to answer the phone, or to answer one that was on or adjacent to a desk. Thus, Claimant was never compelled to answer a phone because it was positioned too high.

3. **The counter was too high.**[12] A platform was installed so that the counter was then lower; while waiting for such installation, a banquet table was placed at the end of the counter, and later a chair next to that, so Claimant could sit down at the table and check out items. Thus, Claimant's restrictions were not violated.

4. **The platform on which Claimant stood at the counter aggravated her back.** RX-28.2 (letter to Mr. Ravenell dated January 26, 1994). There is nothing in Claimant's medical limitations stating she cannot stand on a platform.

5. **The credit card machine, which sat on the counter, was too high.** Tr.252. Claimant did not mention this as a problem in any of the three notices she gave Mr. Payne. Tr.253. Claimant's discomfort without notice to management is insufficient to trigger Employer's responsibility to change her working conditions. There is nothing about the height of the credit

[12]The counter was 3 feet 7 inches tall, and Claimant is 5 feet tall.

card machine that would put a reasonable person on notice that use of it violated Claimant's restrictions.

6. **The safe drawer was too high and too heavy to pull out.** Claimant did not mention this problem in any of her three notices to Mr. Payne. Tr.259. In addition, Claimant admitted in her trial testimony that a library stool was available to use to reach the top drawers of both the safe and file cabinet. Sherry Carthane, a vocational rehabilitation specialist who visited the work site, testified that the safe drawer in question was on ball bearings and popped out easily without much need for muscular effort. Tr.530-531. For the reasons mentioned above in paragraph 5, Employer could not be expected to alter the work site to be sure Claimant was comfortable if she did not put it on notice. Moreover, the Court is persuaded by the other relevant evidence that Claimant was able to obtain what she needed from the drawer by use of the library stool, and that the drawer was not overly heavy to move.

7. **The cash box Claimant had to lift out of the safe drawer was too heavy.** Claimant testified that the cash box, which contained fishing and hunting licenses and money, weighted 7-8 pounds. Claimant admitted that Dr. Hurley had prescribed lifting limits of up to 20 pounds. Therefore, the cash box, assuming Claimant is correct that it weighed 7-8 pounds, did not violate those restrictions. Moreover, Claimant did not tell Mr. Payne in any of her three notices to him that she was having a problem with this. Tr.265.

8. **The top drawer of the filing cabinet was too high, and Claimant had to retrieve items from it.** For the same reasons set forth in paragraph 6, Claimant could access this drawer with the library stool, and therefore her restrictions were not violated. Moreover, she did not tell Mr. Payne this was a problem, so Employer had no opportunity to correct it. Tr.265.

9. **Claimant alleges she had to stand more than one hour at a time, and perhaps up to three hours at a time on five or six occasions.** First, this does not violate her restrictions. Second she did not complain about this in any of her three written notices to Mr. Payne. Claimant testified that she verbally complained. The undersigned does not find this statement credible given Claimant's penchant for documenting everything in writing. Moreover, since standing the length of time she claims did not violate her restrictions, and there were chairs available so she could perform her job sitting, this allegation does not persuade the Court that Claimant was made to work beyond her medical limitations.

10. **Claimant complained that she was left alone at the workplace from time to time.** Tr.274-275. As this does not violate her medical limitations, it does not show that she was made to perform non-suitable alternate employment.

11. **Claimant had to do too much lifting since the customers asked her to carry equipment to their cars.** Tr.275-276. Claimant admitted in her deposition and trial testimony that she did not lift items for customers; she told them she was unable to but would find another employee to help them if they could not do it themselves. In addition, Claimant did not notify Mr. Payne that this was a problem. Tr.277-279.

12. **Claimant had to bend, stoop and crouch to get into the bottom drawers of the filing cabinet and safe, and had to crouch to get forms under the counter.** Such activities did not violate Claimant's medical restrictions as long as done intermittently for up to one hour per day. Claimant did not claim that she did this activity more than that. Claimant did not document this complaint in any of the three notices she gave to Mr. Payne. Tr.279-281. The Court concludes that this activity was consistent with suitable alternate employment.

13. **The banquet table was too low.** Mr. Payne put a chair next to the banquet table to accommodate Claimant. Claimant testified that it was only there for an hour before it disappeared. Tr.281. Claimant's assertion is contradicted by two witnesses, Mr. Payne and Mr. Angelo Martinez, one of her co-workers who testified at the hearing. Mr. Payne testified that he made sure the chair remained by the banquet table, and if it was moved, he did not know about it. Tr.464. Mr. Martinez, whom Claimant accused of kicking the chair away shortly after it was installed, denied doing so. Tr.573. He also testified that the chair stayed behind the banquet table, although in passing it to get to the counter, it was in the way, and he "pushed it occasionally." *Id*. The undersigned found both Mr. Payne and Mr. Martinez to be credible witnesses. The Court therefore concludes that the chair remained by the table, although from time to time it was moved in the general vicinity by employees pushing it away as they went behind the counter to serve customers. There is no reason Claimant could not move it back on those occasions, or ask Mr. Payne to do so. Therefore, it is concluded that Employer did not violate Claimant's restrictions in regard to the table and chair.

14. **The keys to the boats and campers were in a box that was too high off the ground.** Claimant testified that when she had to check out boats and campers, a job ordinarily done by Mr. Payne or the other two co-workers, she would have the customers reach to get the box, so that she never actually had to do this chore. Thus, it is not an issue and will not be addressed by the Court.

15. **The binders in which Claimant had to post changes to the regulations were located on a shelf too high for her.** Tr.283-284. According to his testimony at the hearing, Mr. Payne took the binders down for Claimant and returned them to their shelf after she finished posting. Tr.487-488. Thus, Claimant did not have to violate her restrictions. Claimant denied that Mr. Payne assisted her in this way. However, as the evidence is in equipoise and Claimant has the

burden of proof, the undersigned finds that she is unable to carry it; therefore, the Court finds that Claimant did not have to violate her restrictions and work above her shoulders to retrieve and return binders to a high shelf. Moreover, even if this was a viable issue, Claimant never mentioned it in her three written notices to Mr. Payne. Thus, Employer was not on notice that Claimant's work environment required adjustment. In summary, Claimant has not shown that Employer violated her work restrictions in this instance.

It should be noted that Claimant testified that she verbally complained to Mr. Payne about all of the above alleged violations of her restrictions, even though she neglected to specify them on the three occasions that she gave Mr. Payne written notice. The undersigned does not find this testimony credible. First, Claimant has a penchant to document everything; if these alleged violations were important to her, she would have reduced them to writing in the notices she gave to Mr. Payne. Second, Claimant's testimony and demeanor when testifying regarding this issue was evasive and vague. Thus, the Court concludes that Claimant did not notify Mr. Payne of any of her complaints save those documented in RXs-17, 18, 22.

The Court also questions Claimant's credibility regarding her actual limitations and the amount of actual pain she experienced, for the following reasons. Claimant changed doctors as soon as they found her more capable of work than she represented. This happened on at least two occasions: Dr. Hurley sent Claimant back to work with some restrictions, and Claimant switched to Dr. Pachelli; Dr. Pachelli stated Claimant could work without restrictions, albeit with some workplace adjustment as suggested in Dr. Conley's letter, but Claimant was not satisfied, and asked him to "correct" his opinion. When he refused to do so, Claimant switched doctors again, to Dr. Altman. It is not clear why Claimant left Dr. Altman. She has treated with Dr. Cohn since May 25, 1995. Dr. Cohn agrees with her and is willing to sign declarations that she prepares. Claimant has clearly searched for doctors who will advocate her point of view. She discards those who disagree with her. In addition, the physical therapist who did her work capacity evaluation, found that she magnified her symptoms. For all of the foregoing reasons, the Court does not find credible Claimant's recitation of symptomotolgy and of work site restrictions violations.

Finally, Claimant's refusal to talk to Mr. Gehring, whose sole purpose was to work with her so accommodate her limitations in the workplace, further impugns Claimant's credibility. If Claimant truly wanted to change her workplace so that she could continue to work, she would have met with Mr. Gehring in an attempt to make any changes she felt necessary. Her failure to do so indicates to this Tribunal that she was not seriously motivated to return to work, but more interested in litigating the issues at hand.

The Court further finds that Claimant's resignation was completely voluntary. She refused to work with Employer to correct any problems in the workplace, then when rejected for a supervisory

position, decided she would not work at all. Only if she could be a supervisor would she return to work, as evidenced by her re-application some months later, after she had resigned her supply clerk position. In summary, Claimant has not shown that Employer did not offer her suitable alternate employment, i.e., her position upon return to work did not violate her medical limitations. The Court concludes that Claimant was offered suitable alternate employment without loss of wages. Therefore, Claimant has not lost wage-earning capacity, is not disabled, and is not entitled to compensation.

III. Psychological Injury

A. Summary of Evidence

Dr. Libo was the first psychologist to treat Claimant for her 1990 industrial injury; he focused on biofeedback and pain management. Claimant saw him from approximately February[13] through June 1993, after referral by Dr. Hurley. RX-3, p.43.

Claimant then treated with Dr. Mary Ann Conley, a clinical psychologist, starting October 18, 1993, Tr.200, during the time frame she was under the care of Dr. Pachelli. It is unclear what transpired, as no evidence of her records was submitted, other than her letter setting forth work site modifications that Claimant suggested to her. RX-50.

Dr. Cohn referred Claimant to Dr. Debra A. Saslawsky, a clinical psychologist, for "psychological treatment and coping strategies for work-related injury pain and emotional stressors." RX-53, p.585. Claimant saw Dr. Saslawsky from December 11, 1996 through May 29, 1997, at which time Dr. Saslawsky's treatment apparently terminated, due, at least partially, to Claimant's "insufficient treatment compliance," *Id.* at 611, i.e., failure to follow the treatment plan which included "homework," i.e., reading particular literature intended to help her manage pain and stress. *Id.* at 611. Dr. Saslawsky commented to Claimant that she needed to make as much of a commitment to psychotherapy as she did to her legal case. *Id.*

Dr. Saslawsky diagnosed Claimant with "Adjustment Disorder With Mixed Emotional Features. Other diagnoses that will be explored are Pain Disorder, Major Depression with Anxious Features, and other stress related conditions." *Id.* at 588. Her treatment recommendations included psychotherapy to address: the impact of pursuing her case on her and her family; stress management

[13]Dr. Libo's report does not specify the date he started treating Claimant. The undersigned surmises treatment began sometime in February 1993 based on the physical capacities examination recommendation that she receive biofeedback treatment, and that examination was completed in February 1993. RX-3, pp.35-40.

and coping; pain management; and, mood management. *Id*. Dr. Saslawsky's comment under the diagnostic impressions section of her April 15, 1997 note included "Emotional Distress . . . [secondary] to Pain." *Id*. at 600. The diagnostic impressions section of Dr. Saslawsky's note of May 22, 1997 includes Adjustment Disorder, Mixed, Psychological Factors Affecting Physical Condition, Pain Disorder. *Id*. at 608. At the final session on May 29, 1997, Dr. Saslawsky comments under the diagnostic impressions section: "Going into Major Depression? Monitor closely. Probable Pain Disorder vs (and/or) . . . [psychological] factors Affecting Physical [condition]." *Id*. at 610.

At each session, Claimant focused on her various cases against the Air Force which apparently contributed to much of her stress. For example, on January 30, 1997, Dr. Saslawsky helped Claimant "establish a point of reference for her legal case," *Id.* at 590; on February 13, 1997, Dr. Saslawsky discussed with Claimant "pursuing this case in light of the toll it is taking on her," *Id.* at 592; on February 27, 1997, Claimant "had a setback in case & wasn't able to rebound. Having ruminative thoughts . . . [about] her case," *Id*. at 593; on March 19, 1997, Dr. Saslawsky and Claimant "[d]iscussed not allowing pursuit of this case to take over her life," *Id.* at 594; on April 1, 1997, Claimant told Dr. Saslawsky that "she met 20 other people pursuing discrimination cases on the Base," *Id.* at 595; on April 8, 1997, Claimant scheduled an additional session concerning release of information in her cases, and discussed with Dr. Saslawsky her lawsuit regarding lack of accommodation and constructive discharge, and also left the doctor with information regarding her legal case assuming the doctor would be deposed, *Id.* at 597-598; on April 15, 1997, Claimant discussed the deposition she had recently given, and Dr. Saslawsky was concerned "that we never seem to get specifically focused on pain [management]," *Id.* at 601; on April 22, 1997, Claimant remained "focused on the deposition . . . . discussed the nature of legal proceedings," *Id.* at 602; on April 29, 1997, Claimant felt she was "not coping as well as she would like [with] the case stresses," *Id.* at 604; on May 29, 1997, the final session, discussion focused on Claimant's involvement with her litigation to the detriment of her therapy. *Id.* at 611.

As well, Dr. Saslawsky addressed pain management issues with Claimant at the sessions. For example, on February 13, 1997, Dr. Saslawsky introduced Claimant to cognitive analyses to help her with stress and pain levels, *Id.* at 591; on February 27, 1997, Dr. Saslawsky commented that Claimant did not go to her ceramics class, an activity that had been recommended for distraction, mood and pain management, *Id*. at 593; on March 18, 1997, Dr. Saslawsky commented that Claimant had limited craft work due to increasing pain in her hands and arms, and she discussed with Claimant the relationship between mood and pain, *Id*. at 596. Dr. Saslawsky noted on April 15, 1997, that Claimant wanted to continue stress and mood management, and "this should ultimately help the pain too." *Id.* at 601. On May 22, 1997, Dr. Saslawsky noted that she explained to Claimant the "pain - stress - overdoing cycle." *Id*. at 608.

Claimant located Dr. Anthony Traweek, a psychologist, and began treatment with him on

December 16, 1997; Dr. Cohn acknowledged this in a note dated December 22, 1997. Tr.105.

Dr. Traweek was deposed post-trial on November 19, 1999, in lieu of trial testimony. That deposition has been designated as CX-UU. Dr. Traweek testified that he has been a clinical and consulting psychologist since 1976 and that he is licensed in the state of New Mexico. Twenty per cent of his practice is direct patient care. *Id*. at 265. Dr. Traweek testified that Dr. Cohn referred Claimant as an "approved worker's compensation case" in December 1997 for treatment of emotional and psychological distress which was interfering with medical intervention. *Id.* at 266-267. Claimant's initial complaints on the first visit on December 16, 1997, were: (1) medical impairments limiting physical functioning; and, (2) legal processes interfering with dealing with chronic pain. *Id.* at 271. Dr. Traweek stated that his preliminary diagnoses were: rule out major depressive disorder, moderate, versus depressive disorder, not otherwise specified ("NOS"); rule out anxiety disorder; had some symptoms of post-traumatic stress disorder; pain disorder with both psychological and medical conditions. Dr. Traweek testified that one year later he had ruled out post-traumatic stress disorder. As of January 15, 1998, pain disorder was an official diagnosis. CX-UU, p.76.

Dr. Traweek signed a declaration prepared by Claimant on January 16, 1998, in which he stated that Claimant's mental health problems are directly related to her EEOC complaint, non-accommodation by Employer and subsequent litigation, as well as her worker's compensation claim, and pain associated with work-related injuries. CX-F, p.11.

Dr. Traweek submitted six reports to Dr. Cohn summarizing his treatment of Claimant. The first report is dated January 28, 1998, and covers dates he saw Claimant on December 16, 1997, January 6, 1997, January 14, 1997, and January 28, 1997. His initial diagnostic impressions were:

> Major Depressive Disorder, moderate, chronic; Anxiety Disorder Not Otherwise Specified; and, Pain Disorder Associated with Medical Conditions (probable mild exacerbation by psychological factors).
> Ms. Phillips mental health problems appear to be directly related to her experiences associated with an Equal Employment Opportunity Commission (EEOC) complaint; non-accommodation by her employer and subsequent litigation; medical determinations and actions associated with a claim involving the Federal Workers' Compensation Program (WCP); and the experience of pain associated with work related injuries (bilateral rotator cuff impingement and tendinitis, as well as low back pain and lumbar radiculopathy) which you are treating.

CX-OO, p.167.

Dr. Traweek stated the following as his treatment plan:

1. Facilitate Ms. Phillips' ability to clearly and openly discuss her chronic pain with her physician. Educate her about the real benefits of appropriate medication to mediate her experience of pain and depression. Encourage her to accept medical recommendations for medication and to take the medication for a sufficient period of time to determine efficacy.
2. Encourage use of pain management strategies developed with previous medical and mental health providers.
3. Facilitate integration and accommodation of emotional, cognitive and behavior sequela [sic] to her experiences with the EEOC and WCP and subsequent litigation.
4. Collateral data will be obtained from Ms. Phillips [sic] spouse.

Id. at 168.

Dr. Traweek's next report to Dr. Cohn is dated March 31, 1998, and is found at CX-OO, pp.178-80. The report covers ten appointments with Claimant, one of which was a "no show" and two of which were cancellations (i.e., seven actual appointments). The report evidences progress with treatment goals: Claimant is described as "willing to initiate a prolonged trial of antidepressant medication to mediate her chronic pain and depression," *Id*. at 178; Claimant is using non-pharmacologic pain management strategies, as learned from Drs. Libo and Saslawsky (deep muscle relaxation, cognitive, imagery, auditory (taped sea shore) and breathing techniques), and Dr. Traweek continues to encourage her in this area; Claimant has "increasing insight into how stress and tension associated with the [EEOC and OWCP] litigation impact her experience of pain. . . . It appears progress in this area will be directly related to the degree of perceived support, acceptance and trust developed in our therapeutic relationship; to her ability and willingness to separate her sense of self from the litigation process; and to the course of the litigation itself." *Id*. at 179. Dr. Traweek's diagnoses of Claimant remain the same, except that he mentions "Pain Disorder associated with above conditions, with mild exacerbation by psychological factors, chronic," under Axis III, "Medical Conditions," rather than under Axis I, "Clinical Disorders," and adds a Global Assessment of Functioning ("GAF")[14] of

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[14]According to the DSM-IV at p.32, the GAF scale states the following:

Consider psychological, social, and occupational functioning on a hypothetical continuum of mental health-illness. Do not include impairment in functioning due to physical (or environmental) limitations.

Code (**Note:** Use intermediate codes when appropriate, e.g., 45, 68, 72.)

91 - 100 **Superior functioning in a wide range of activities, life's problems never seem to get out of hand, is sought out by others because of his or her many positive qualities. No symptoms.**

"60" (current, moderate impairment) and "60" (past year, moderate impairment). *Id.* Dr. Traweek's plan addresses Claimant's: chronic pain and depression through antidepressant medication (handled by

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81 - 90	**Absent or minimal symptoms** (e.g., mild anxiety before an exam), **good functioning in all areas, interested and involved in a wide range of activities, socially effective, generally satisfied with life, no more than everyday problems or concerns** (e.g., an occasional argument with family members).
71 - 80	**If symptoms are present, they are transient and expectable reactions to psychosocial stressors** (e.g., difficulty concentrating after family argument); **no more than slight impairment in social, occupational, or school functioning** (e.g., temporarily falling behind in schoolwork).
61 - 70	**Some mild symptoms** (e.g., depressed mood and mild insomnia) **OR some difficulty in social, occupational, or school functioning** (e.g., occasional truancy, or theft within the household), **but generally functioning pretty well, has some meaningful interpersonal relationships.**
51 - 60	**Moderate symptoms** (e.g., flat affect and circumstantial speech, occasional panic attacks) **OR moderate difficulty in social, occupational, or school functioning** (e.g., few friends, conflicts with peers or co-workers).
41 - 50	**Serious symptoms** (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting) **OR any serious impairment in social, occupational, or school functioning** (e.g., no friends, unable to keep a job).
31 - 40	**Some impairment in reality testing or communication** (e.g., speech is at times illogical, obscure, or irrelevant) **OR major impairment in several areas, such as work or school, family relations, judgment, thinking, or mood** (e.g., depressed man avoids friends, neglects family, and is unable to work; child frequently beats up younger children, is defiant at home, and is failing at school).
21 - 30	**Behavior is considerably influenced by delusions or hallucinations OR serious impairment in communication or judgment** (e.g., sometimes incoherent, acts grossly inappropriately, suicidal preoccupation) **OR inability to function in almost all areas** (e.g., stays in bed all day; no job, home, or friends).
11 - 20	**Some danger of hurting self or others** (e.g., suicide attempts without clear expectation of death; frequently violent; manic excitement) **OR occasionally fails to maintain minimal personal hygiene** (e.g., smears feces) **OR gross impairment in communication** (e.g., largely incoherent or mute).
1 - 10	**Persistent danger of severely hurting self or others** (e.g., recurrent violence) **OR persistent inability to maintain minimal personal hygiene OR serious suicidal act with clear expectation of death.**
0	Inadequate information.

Dr. Cohn); non-pharmacologic strategies for pain management, including exercise and pleasurable activities; "supportive and cognitive-behavioral strategies . . . to facilitate . . . resolution of emotional and psychological accompaniments to the EEOC/OWCP litigation process . . . . [for] management of her depression and chronic pain; obtaining of collateral data from spouse and primary support agent for EEOC/OWCP litigation." *Id*. at 180.

Dr. Traweek's third report to Dr. Cohn is dated June 10, 1998, and is found at CX-OO, pp.194-196. The report covers nine visits, one of which was cancelled and one of which was an interview with Max Hernandez, Claimant's EEOC/OWCP lay representative for purposes of collecting "collateral data." Dr. Traweek reports use of and compliance with pain medication, continuing support for Claimant's use of non-pharmacologic pain management strategies, supportive therapy to help Claimant with stress generated by EEOC/OWCP activities: "It appears progress in this area will be directly related to the degree of perceived support acceptance and trust developed in our therapeutic relationship and to her ability and willingness to separate her sense of self from the litigation process." *Id*. at 195; collateral data collected from Max Hernandez. Claimant's diagnoses and GAF remained the same as in the prior report.

Dr. Traweek's fourth report to Dr. Cohn is dated September 15, 1998, and found at CX-I, p.39. He states he has seen Claimant from June 2, 1998 to September 15, 1998, for a total of 16 treatments, one of which was cancelled. Dr. Traweek indicates that the antidepressant being prescribed is efficacious, and that she continues to use non-pharmacologic pain management strategies, although she reported "increased . . . pain symptoms and their impact on functional capacity during contentious and stressful periods associated with increased litigation activity." *Id*. at 39. Dr. Traweek states that Claimant's EEOC and worker's compensation litigation causes "situational exacerbations . . . resulting in the recurrence of intrusive imagery and thinking and avoidant behavior. . . . decrease her functional capacity, increase levels of stress and tension, and intensify her chronic pain syndrome." *Id.* at 40. Dr. Traweek diagnoses remain the same, except her GAF is now: current: 65 (mild to moderate); past year: 65 (mild to moderate). Dr. Traweek comments that the Air Force is refusing to pay him for his services. *Id.* at 42.

Dr. Traweek's fifth report to Dr. Cohn is dated December 31, 1998, and covers 11 treatment dates with Claimant from October 1, 1998 to December 15, 1998. CX-J, pp.43-46. During this period, he saw her at approximately weekly intervals. Dr. Traweek continued to support Claimant's use of antidepressant medication to mediate her chronic pain and depression, and use of non-pharmacologic pain management strategies. Dr. Traweek indicates Claimant's functional capacity is better, her diagnoses are the same, and her GAF has risen to 70 (current, mild impairment – stable) and

70 (past year, mild impairment).[15] Dr. Traweek indicates that Claimant will now be seen on a bi-weekly basis.

Dr. Traweek's sixth report to Dr. Cohn is dated June 1, 1999 and covers the period January 14, 1999, to June 1, 1999. CX-L, pp.66-69. Dr. Traweek was seeing Claimant at approximately one month intervals during this period, for a total of seven visits. He continued to support Claimant's use of antidepressant medication to mediate her chronic pain and depression, and use of non-pharmacologic pain management strategies. Dr. Traweek indicates that "Ms. Phillips remains adamant that litigation issues discussed previously in my reports continue to be clarified." *Id.* at 67. Dr. Traweek's diagnoses of Claimant remained the same as did the GAF of 70/70. Dr. Traweek indicates that the Air Force has only paid for services rendered in August 1998.

Dr. Traweek continues to treat Claimant and now sees her every month or every month and a half. Dr. Traweek saw Claimant on September 2, 1999. She showed stress and anxiety as a result of the trial held on August 25 and 26, 1999, in the instant case. CX-UU, p.281-282. Claimant and Dr. Traweek also discussed the upcoming deposition. Dr. Traweek summarized Claimant's situation this way:

> And the stress, not only is it that she's had this long litigation process going on, but every time she gets involved in it, she has to review records, she has to look at things, which, to some extent, still remain triggers for her that trigger off emotional things inside.

Id. at 286. Dr. Traweek testified that Claimant's emotional state is "remarkably more positive" compared to the first time he saw her. At the time of the deposition, Dr. Traweek's last session with Claimant was November 10, 1999, and his most recent diagnosis was: major depressive disorder, mild, stable (296.32) and anxiety disorder, NOS, mild, resolving (300.0). *Id.* at 291. Dr. Traweek reiterated his opinion that these diagnoses were caused by Claimant's 1992[16] accident or fall at Employer.

Dr. Traweek claims that Respondent has only paid $375.00 to him and at the time of the deposition still owed him $8,625.00. *Id*. at 293. Dr. Traweek did however admit that he billed Respondent for a declaration prepared on January 16, 1998, for a lawsuit in which Respondent was the defendant. *Id*. at 349.

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[15]It is unclear how Claimant's past year GAF could change from 65 (as it was in Dr. Traweek's September 15, 1998, report) to 70, as it is in this report.

[16]This is assumed to be an error in the question posed; it is assumed that Dr. Traweek was referring to Claimant's ***1990*** accident.

On cross-examination, Dr. Traweek corrected the DSM-IV code for his major depressive disorder diagnosis: it should be "296.31" rather than "296.32." Dr. Traweek stated that he only reviewed Claimant's psychological records, not her medical records, because he was depending on Dr. Cohn for medical information, that Dr. Cohn would have done the medical review. CX-UU, pp.340-341. Dr. Traweek testified that he was unaware that Claimant suffers from hypothyroidism, that if she does, two of his diagnoses could be void: major depression[17] and anxiety disorder, NOS. *Id.* at 415.

Dr. Traweek testified that legal issues were discussed during the sessions, i.e., about 50% of the time during the January 5, 1998 session. Dr. Traweek did not know the extent of Claimant's legal complaints. "I knew the specifics of some of them. I didn't know the number. But I knew it was complicated, and I knew she put a lot of energy into it." CX-UU, p.316. Dr. Traweek testified that Claimant spent most of the January 14, 1998 session talking about legal issues. *Id*. at 322. A "significant portion" of the February 24, 1998 session was spent talking about legal problems. *Id.* at 353. Claimant spent 30 to 40% of the April 7, 1998 session talking about legal issues. *Id.* at 359. A large percentage of the session on May 5, 1998, involved discussion of legal issues. *Id.* at 360-361. On May 20, 1998, Dr. Traweek interviewed Max Hernandez, Claimant's "advocate representative since 1989," for "collateral functional capacity data." *Id.* at 368. On June 8, 1998, Dr. Traweek and Claimant spent a "fair amount" of time talking about legal issues. *Id*. at 378-379. Dr. Traweek testified that Claimant's anxiety and distress increases and subsides in conjunction with litigation activity, looking at his notes and reports, i.e., as litigation heated up in June 1999 with the court date of August 23, 1999, Claimant experienced an "acute exacerbation," and "restabilized" after the August 1999 hearing. *Id.* at 386-407.

Dr. Traweek testified that he personally did not know what Claimant's work restrictions were or whether or not Employer accommodated her; he also admitted he did not know what Claimant's specific duties were. *Id*. at 345-346. Dr. Traweek never visited the work site.

Dr. Traweek confirmed that his declaration in Case No. 94-1044N (in federal district court) stated:

> [T]he true extent of her [Claimant's] medical disabilities and identified work-related injuries will be difficult to truly assess as long as she is involved in this process of making a point and standing up for her rights which is causing significant emotional and psychological distress.

CX-UU, p.348.

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[17]Dr. Traweek admitted that Claimant's symptoms 1, 2, 4, 5, 6, and 8 (components of depressive disorder, see *infra*, n.18) could result from hypothyroidism. CX-UU, p.311.

Dr. Traweek stated in his letter to Dr. Cohn dated January 28, 1998, that Claimant had "continuing difficulty in separating her medical/physical limitations from all the stress associated with EEOC/USAF issues. . . . . [Claimant has] extreme difficulty obtaining distance from perceived harassment/persecution by AF/EEOC." *Id.* at 351.

Dr. Harold Ginzburg, M.D., testified by deposition in lieu of trial as Respondent's psychiatric expert. He has been a board-certified psychiatrist for 25 years. He evaluates and treats patients with psychiatric or neuropsychiatric problems as a result of physical injury, chronic illness or traumatic incident. He is the author of 135 publications, including one book and three monographs, and 86 abstracts or named presentations (lectures). RX-54, pp.614-617.

According to Dr. Ginzburg's testimony, Claimant refused to submit to an examination by him. However, Dr. Ginzburg observed Claimant at the trial on August 25-26, 1999, walking in and outside of the courtroom and during cross-examination. He reviewed all of Respondent's exhibits offered at trial (RXs-1-53) and 17 other medical documents concerning Claimant, the first of which is dated November 5, 1990, one day prior to Claimant's industrial accident. RX-2, p.5. He reviewed RX-2 and other Kirtland records indicating that Claimant was taking thyroid medication in 1993 and 1994. A thyroid panel was ordered in August 1996, but the results were not attached. At trial, Claimant testified that she had run out of thyroid medication and it had been six months since she had gotten a refill. RX-54, pp.619-628. Dr. Ginzburg inferred from the above that Claimant had hypothyroidism since she was taking thyroid medication, i.e., synthyroid. Dr. Ginzburg testified that if Claimant was not taking her thyroid medication, she would become hypothyroid and the effects of that can include clinical depression, sensitivity to cold, difficulty in thinking clearly, lethargy, impairment of sleep and weight gain. *Id.* at 629. He added that this condition can cause any of the symptoms listed under Criteria A for a Major Depressive Disorder, DSM-IV (p.327) 296.32.[18]

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[18]As per Dr. Ginzburg's citation, Criteria A through E for a Major Depressive Episode follow:

A. Five (or more) of the following symptoms have been present during the same 2 week period and represent a change from previous functioning; at least one of the symptoms is either (1) depressed mood or (2) loss of interest or pleasure.

Note: Do not include symptoms that are clearly due to a general medical condition, or mood-incongruent
delusions or hallucinations.

(1 depressed mood most of the day, nearly every day, as indicated by either subjective report (e.g., feels sad or empty) or observation made by others (e.g., appears tearful). **Note:** In children and adolescents, can be irritable mood.

On cross-examination, Dr. Ginzburg did admit that Claimant's thyroid function test results for January 1995 and September 21, 1999 were within normal limits; therefore, Claimant was not suffering from hypothyroidism within those two time frames. Dr. Ginzburg also admitted that Claimant seemed "animated" at trial (in August 1999) even though she had not taken her thyroid medication for the past six months. RX-54, pp. 682-683.

Dr. Ginzburg testified that the DSM-IV instructs that one must consider both the behavioral or psychological aspects of a patient, as well as the medical aspects, in order to rule out or in any

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(2 markedly diminished interest or pleasure in all, or almost all, activities most of the day, nearly every day (as indicated by either subjective account or observation made by others)
(3 significant weight loss when not dieting or weight gain (e.g., a change of more than 5% of body weight in a month), or decrease or increase in appetite nearly every day. **Note:** In children, consider failure to make expected weight gains.
(4 insomnia or hypersomnia nearly every day
(5 psychomotor agitation or retardation nearly every day (observable by others, not merely subjective feelings or restlessness or being slowed down)
(6 fatigue or loss of energy nearly every day
(7 feelings of worthlessness or excessive or inappropriate guilt (which may be delusional) nearly every day (not merely self-reproach or guilt about being sick)
(8 diminished ability to think or concentrate, or indecisiveness, nearly every day (either by subjective account or as observed by others)
(9 recurrent thoughts of death (not just fear of dying), recurrent suicidal ideation without a specific plan, or a suicide attempt or a specific plan for committing suicide

B. The symptoms do not meet criteria for a Mixed Episode (see p. 335).

C. The symptoms cause clinically significant distress or impairment in social, occupational, or other important areas of functioning.

D. The symptoms are not due to the direct physiological effects of a substance (e.g., a drug of abuse, a medication) or a general medical condition (e.g., hypothyroidism).

E. The symptoms are not better accounted for by Bereavement, i.e., after the loss of a loved one, the symptoms persist for longer than 2 months or are characterized by marked functional impairment, morbid preoccupation with worthlessness, suicidal ideation, psychotic symptoms, or psychomotor retardation.

condition.[19] In fact, in several places in the DSM-IV, hypothyroidism is used as an example of a condition to consider before rendering a diagnosis such as major depressive disorder.[20] *Id.* at 632-634.

It was Dr. Ginzburg's opinion that Claimant has demonstrated by her production of documents and by her participation in litigation that she is able to function within a socially important aspect of her job: she has the ability to concentrate, to focus, and to be actively involved in productive activity. Therefore, her behavior is not consistent with the symptoms described in criteria "C"[21] and a diagnosis of Major Depressive Disorder is not appropriately descriptive of Claimant. Nor is the diagnosis of Anxiety Disorder, NOS, warranted due to the fact that Claimant's hypothyroidism was not ruled out as the cause of her symptoms. *Id.* at 641-648. Dr. Ginzburg further testified that, after review of Dr. Traweek's notes, he found a temporal relationship between Claimant's legal activities and her periods of stability and periods of reported acute exacerbation. For instance, following the trial on August 25-26, 1999, Dr. Traweek changed Claimant's diagnosis from 296.32 to 296.31 which indicates clinical improvement from moderate to mild symptoms. *Id.* at 653.

Dr. Ginzburg testified regarding the six reports that Dr. Traweek had submitted to Dr. Cohn, dated as follows: January 28, 1998 (CX-OO, p.167); March 31, 1998 (CX-OO, p.178); June 10, 1998 (CX-OO, p.194); September 15, 1998 (CX-I, p.39); December 31, 1998 (CX-J, p.43); June 1, 1999 (CX-L, p.66). Dr. Ginzburg found that the primary theme of the reports was Claimant's litigation. For instance, Dr. Traweek states repeatedly, "preoccupation with and rumination about the EEOC and OWCP litigation." Litigation appears to be the major stressor. *Id.* at 653-665. Dr. Ginzburg observed that there is no indication that Claimant was ever dysfunctional in regard to her ability to engage in litigation activities. Dr. Ginzburg concluded that Dr. Traweek supported Claimant so she could continue to be involved in her litigation. Dr. Ginzburg opined that being involved in litigation is not a psychiatric condition and cited the DSM-IV, p.22 which states that the definition of a mental disorder excludes "conflicts that are primarily between the individual and society . . . unless . . . [the] conflict is a symptom of a dysfunction in the individual." DSM-IV, p.xxii.

It is Dr. Ginzburg's opinion that Claimant does not suffer from a psychiatric disorder as defined by the DSM-IV. Dr. Ginzburg opined that Claimant left the job with Employer because of her

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[19]"[A] substance-induced and general medical etiology must be considered and ruled out before the disorder can be diagnosed." DSM-IV, p.325.

[20]See, e.g., *supra* note 18, under criteria "D"; DSM-IV, p.7, under criteria for a Mental Disorder due to a General Medical Condition; *Id*. at 325, paragraph labeled "Differential Diagnosis."

[21]See *supra*, note 18.

orthopedic problem and because she had commenced legal and administrative proceedings against Employer, and not because of a psychiatric problem. RX-54, pp.668-669.

However, when cross-examined, Dr. Ginzburg testified that Claimant does have a somatoform disorder as defined by the DSM-IV,[22] but not a somatization disorder[23] as Dr. Traweek diagnosed.

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[22]According to the DSM-IV, pp. 451-452, an "Undifferentiated Somatoform Disorder" is defined as follows:

A. One of more physical complaints (e.g., fatigue, loss of appetite, gastrointestinal or urinary complaints).
B. Either (1) or (2):
   (1) after appropriate investigation, the symptoms cannot be fully explained by a known general medical condition or the direct effects of a substance (e.g., a drug of abuse, a medication)
   (2) when there is a related general medical condition, the physical complaints or resulting social or occupational impairment is in excess of what would be expected from the history, physical examination, or laboratory findings
C. The symptoms cause clinically significant distress or impairment in social, occupational, or other important areas of functioning.
D. The duration of the disturbance is at least 6 months.
E. The disturbance is not better accounted for by another mental disorder (e.g., another Somatoform Disorder, Sexual Dysfunction, Mood Disorder, Anxiety Disorder, Sleep Disorder, or Psychotic Disorder).
F. The symptom is not intentionally produced or feigned (as in Factitious Disorder or Malingering).

[23]According to the DSM-IV, pp.449-450, a "Somatization Disorder" is defined as follows:

A. A history of many physical complaints beginning before age 30 years that occur over a period of several years and result in treatment being sought or significant impairment in social, occupational, or other important areas of functioning.
B. Each of the following criteria must have been met, with individual symptoms occurring at any time during the course of the disturbance:
   (1) *four pain symptoms*: a history of pain related to at least four different sites or functions (e.g., head, abdomen, back, joints, extremities, chest, rectum, during menstruation, during sexual intercourse, or during urination)
   (2) *two gastrointestinal symptoms*: a history of at least two gastrointestinal symptoms other than pain (e.g., nausea, bloating, vomiting other than during pregnancy, diarrhea, or intolerance of several different foods)
   (3) *one sexual symptom*: a history of at least one sexual or reproductive symptom other than

RX-54, pp.686-689. Dr. Ginzburg also stated in his written report that Claimant has the diagnostic criteria of somatoform disorder, that this condition existed prior to her industrial injury,[24] and that, to a "medical degree of certainty," the severity of this disorder does not appear to have increased since such injury. Respondent's Ginzburg Deposition Exhibit-1 ("RGX-1"), p.698.

B. Legal Analysis

Employer argues that Claimant's psychiatric impairment, if any, is not related to her industrial injury of November 6, 1990. Based on that argument, Employer refuses to pay Claimant's treating psychologist, Dr. Traweek. Claimant counters that she has *bona fide* psychiatric impairments that require treatment, and that such impairments are the result of her November 1990 industrial injury.

An injury compensable under the Act must arise out of and in the course of employment.

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pain (e.g., sexual indifference, erectile or ejaculatory dysfunction, irregular menses, excessive menstrual bleeding, vomiting throughout pregnancy)

(4) *one pseudoneurological symptom*: a history of at least one symptom or deficit suggesting a neurological condition not limited to pain (conversion symptoms such as impaired coordination or balance, paralysis or localized weakness, difficulty swallowing or lump in throat, aphonia, urinary retention, hallucinations, loss of touch or pain sensation, double vision, blindness, deafness, seizures; dissociative symptoms such as amnesia; or loss of consciousness other than fainting)

C. Either (1) or (2):

(1) after appropriate investigation, each of the symptoms in Criterion B cannot be fully explained by a known general medical condition or the direct effects of a substance (e.g., a drug of abuse, a medication)

(2) when there is a related general medical condition, the physical complaints or resulting social or occupational impairment are in excess of what would be expected from the history, physical examination, or laboratory findings

D. The symptoms are not intentionally produces or feigned (as in Factitious Disorder or Malingering).

[24]Dr. Ginzburg also opined that Claimant had a "history of mental illness, that includes a pain syndrome complex, depression and a somatization disorder that predate the incident in question." RX-54, pp.690, 700-701. Based on Dr. Ginzburg's testimony, the undersigned infers that he confused "somatization" with "somatoform" and meant in the above sentence to say "somatoform," since he testified that Claimant *did not* have a somatization disorder, but did have a somatoform disorder.

Section 20(a) of the Act provides that "in any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary — (a) that the claim comes within the provisions of the Act." 33 U.S.C. §920(a). Thus, to invoke the Section 20(a) presumption, the claimant must establish a *prima facie* case of compensability by showing that he or she suffered some harm or pain, *Murphy v. SCA/Shayne Brothers*, 7 BRBS 309 (1977), *aff'd mem.*, 600 F.2d 280 (D.C. Cir. 1979), and that working conditions existed or an accident occurred that could have caused the harm or pain, *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). The presumption cannot be invoked if a claimant shows only that he or she suffers from some type of impairment. *U.S. Industries/ Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 615, 102 S.Ct. 1312, 1317 (1982) ("The mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer."). However, a claimant is entitled to invoke the presumption if he or she presents at least *"some* evidence tending to establish" both prerequisites and is not required to prove such prerequisites by a preponderance of the evidence. *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 296 n.6 (D.C. Cir. 1990).

Section 7 of the Act, 33 U.S.C. § 907, entitles a claimant to medical benefits for reasonable and necessary treatment of a work-related injury, including any psychological problems arising from it. *Kelley v. Bureau of National Affairs and Federal Insurance Co.*, 20 BRBS 169, 171-172 (1988). If an industrial injury aggravates, accelerates or combines with a pre-existing psychological problem, the entire condition is compensable. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th cir. 1966); *Turner v. The Chesapeake & Potomac Telephone Co.*, 16 BRBS 255 (1984).

Claimant is able to establish a *prima facie* case that her psychiatric disorder arose out of her industrial accident on November 6, 1990. Dr. Traweek along with Dr. Ginzburg both testified that Claimant has a pain disorder.[25] Dr. Traweek has stated that Claimant's psychological disorders, which include her pain disorder, were caused by the November 1990 industrial injury. Thus, this evidence establishes Claimant's *prima facie* case.

Once the Section 20(a) presumption is invoked, the burden shifts to the employer. To rebut the presumption, the employer must present substantial evidence that the injury was not caused by the claimant's employment. *Dower v. General Dynamics Corp.*, 14 BRBS 324 (1981). If the presumption is rebutted, it falls out of the case, and the administrative law judge must weigh all of the evidence and resolve the issue based on the record as a whole. *Hislop v. Marine Terminals Corp.*, 14 BRBS 927 (1982). The ultimate burden of proof then rests on the claimant under the Supreme Court's decision in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251 (1994). See also *Holmes v. Universal Maritime Services Corp.*, 29 BRBS 18, 21 (1995).

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[25]Dr. Ginzburg diagnosed a somatoform disorder and Dr. Traweek diagnosed a somatization disorder as well as a general pain disorder. See notes 22 & 23, *supra*.

Employer is able to carry its burden to rebut Claimant's *prima facie* case. Dr. Ginzburg testified that although Claimant does have a pain disorder, her industrial injury did not cause it; rather, it preceded such injury. In addition, Dr. Ginzburg testified that Claimant does not have any other psychiatric disorder: her thyroid disorder could mimic a depressive or anxiety disorder, and moreover, she is fully functional as her focused litigation activity demonstrates. Based on the foregoing, the undersigned finds that Employer has rebutted Claimant's *prima facie* case by substantial evidence.

The next step in the analysis is to weigh the evidence as a whole; Claimant has the burden of proof to show by the preponderant evidence that her psychological condition was caused by the industrial accident she suffered on November 6, 1990. The undersigned finds that she has carried that burden. All psychologists who have treated Claimant after her November 1990 injury agree that she has some kind of pain disorder;[26] the list includes Drs. Libo, Saslawsky, and Traweek. Even the defense psychiatric expert, Dr. Ginzburg agrees that Claimant has a pain disorder. In addition, there is no dispute that Claimant physically injured herself at Employer's work site in November 1993.[27] The entire medical record following the accident documents complaints of pain related to the areas of Claimant's body which were injured on that date. All of Claimant's treating doctors document complaints of and treatment for pain at those areas of Claimant's body. The evidence consistently shows a pattern of pain complaints related to Claimant's industrial injury on November 6, 1993. Although there is one medical record documenting a complaint of right shoulder pain on November 5, 1990, RX-2, p.5, the day before the injury, the documentation following the injury shows a pattern of increasing intensity and duration of pain in the right shoulder and the lower back, as well as "over-compensation" pain in the left shoulder. The preponderant evidence shows that Claimant's pain disorder was aggravated and accelerated by the industrial injury at issue in this case. Therefore, Claimant is entitled to medical care for it.

Employer argues that since Claimant appears to be fully functional, she has no psychiatric disorder. In other words, Dr. Traweek's diagnoses of major depression and anxiety disorder do not meet the "C" criteria of the DSM-IV and are therefore not disabling diagnoses, if valid at all.[28]

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[26]Dr. Conley is excepted from this statement in that her treatment records are not part of the evidence submitted; the only document of hers in evidence is CX-50 which suggests work site changes to accommodate Claimant's physical restrictions.

[27]See stipulation of parties #3, *supra* p.2.

[28]Dr. Ginzburg also raised doubts regarding the efficacy of these diagnoses based on the fact that Claimant has had an ongoing thyroid disorder for some years which could cause symptoms of depression and/or anxiety.

However, Employer is unable to show that Claimant's level of functioning would continue absent Dr. Traweek's treatment. Dr. Traweek's treatment record over time shows Claimant making steady improvement, as documented by greater intervals between sessions, an increase in her GAF, and progression to less severe diagnoses, i.e., movement from moderate to mild depression.[29]

Employer also argues that Dr. Traweek's treatment was merely used to support Claimant while she filed and pursued numerous actions and complaints, one of which is currently before this Court. Employer may understandably not wish to pay for any support which may, even indirectly, encourage Claimant to file and pursue numerous complaints against it; however, that "support" was a by-product of the treatment as a whole, which was aimed at helping Claimant to alleviate stress which increased pain; and that pain was part of an undisputed pain disorder which warranted psychiatric treatment. In summary, this Court finds that Claimant's pain disorder was aggravated and accelerated by her November 6, 1990 industrial injury; therefore, Employer must pay her psychologist, Dr. Traweek, for her treatment.

IV. Maximum Medical Improvement

"Maximum medical improvement" and "permanent and stationary" are legal concepts developed in case law to ascertain when a claimant's condition has moved from a temporary to a permanent status. The *AMA Guides for the Evaluation of Permanent Impairment*, 4th ed. (1993) also offer some guidance:

> **Report of medical Evaluation (Permanent Medical Impairment)**
> . . . . . .
> **4. Stability of the medical condition**
>
> a. The clinical condition is stabilized and not likely to improve with surgical intervention or active medical treatment; medical maintenance care only is warranted.
> b. The degree of impairment is not likely to change substantially within the next year.
> c. The patient is not likely to suffer sudden or subtle incapacitation.

AMA Guides, p. 11.

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[29]Although Dr. Traweek's diagnoses of depression and anxiety have been thrown into doubt by his admission that he was unaware of Claimant's thyroid disorder, the lessening in their severity does demonstrate that Dr. Traweek observed improvement in Claimant's behavior, mood and functioning.

A disability will be considered permanent if the employee's impairment has continued for a lengthy period and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). See also *Crum v. General Adjustment Bureau*, 738 F.2d 474, 480 (D.C. Cir. 1984) (physician's evaluations of claimant indicated that his heart condition, although improved, was of indefinite duration); *Air America, Inc. v. Director, OWCP*, 597 F.2d 773, 781-82 (1st Cir. 1979); *Care v. Washington Metro. Area Transit Auth.*, 21 BRBS 248, 251 (1988).

Permanency does not, however, mean unchanging. Permanency can be found even if there is a remote or hypothetical possibility that the employee's condition may improve at some future date. *Watson*, 400 F.2d at 654; *Mills v. Marine Repair Serv.*, 21 BRBS 115, 117 (1988). Likewise, a prognosis stating that chances of improvement are remote is sufficient to support a finding that a claimant's disability is permanent. *Walsh v. Vappi Constr. Co.*, 13 BRBS 442, 445 (1981); *Johnson v. Treyja, Inc.*, 5 BRBS 464, 468 (1977).

The date a claimant's condition becomes permanent is a question of fact to be determined by the medical evidence and not by economic or vocational factors. Thus, the medical evidence must establish the date on which the claimant has received the maximum benefit of medical treatment such that his condition is not expected to improve. *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 60 (1985); *Mason v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984).

If a physician believes that further treatment should be undertaken, then a possibility of success exists, and even if, in retrospect, it was unsuccessful, maximum medical improvement does not occur until the treatment is complete. *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70, 74 (1997) (citations omitted). Where surgery is anticipated, maximum medical improvement has not yet been reached. *Kuhn v. Associated Press*, 16 BRBS 46, 48 (1983). When a claimant has undergone surgery, maximum medical improvement occurs only after the claimant has recovered from the surgery. *Walker v. National Steel & Shipbuilding Co.*, 8 BRBS 525 (1978); *Edwards v, Zapata Offshore Co.*, 5 BRBS 429 (1977). However, if anticipated surgery is not expected to improve a claimant's condition or if a claimant reasonably refuses to undergo surgery, the condition may be considered permanent. *Phillips v. Marine Concrete Structures*, 21 BRBS 233 (1988); *Worthington v. Newport News Shipbuilding and Dry Dock Company*, 18 BRBS 200 (1986).

A. Physical Maximum Medical Improvement

Dr. Hurley, Claimant's first treating doctor, and an orthopedic surgeon who performed surgery on her right shoulder, declared that she had reached maximum medical improvement on February 23,

1993. RX-3, p.21. Dr. Hurley was treating Claimant for both her back and her shoulders. Therefore, it is reasonable to conclude he specified maximum medical improvement for both back and shoulders.

Dr. Pachelli, Claimant's second treating physician, and an orthopedist, stated Claimant could work without restrictions, but approved of Dr. Conley's suggestions for work site modification. Dr. Pachelli also stated that he would "follow up with this patient on an as needed basis." RX-7, p.69. The undersigned interprets this language to indicate that maximum medical improvement had been reached, since Dr. Pachelli specifies no continuing treatment needed, but only follow-up on an "as needed" basis. This would indicate that Claimant had reached the point when she would no longer benefit from medical treatment, and thus had reached maximum medical improvement.

Since Claimant only saw Dr. Altman twice, it is difficult to assess his opinion regarding maximum medical improvement. Therefore, he will not be considered as a medical resource to determine maximum medical improvement.

Claimant began treatment with Dr. Cohn on May 25, 1995. Dr. Cohn testified at trial that Claimant had not yet reached maximum medical improvement. Dr. Cohn testified that when he saw her he found "problems with shoulder pain, neck pain . . . . difficulties with the rotator cuff on the right and impingement of the rotator cuff on the left. . . . back pain . . . and problems probably with a pinched nerve in the low back and she had carpal tunnel syndrome." Tr.79. Dr. Cohn admitted in is trial testimony, that he signed declarations which included opinions about the source of Claimant's medical problems, such as failure to accommodate her limitations in the workplace from July 1993 to February 1994, based solely on Claimant's representations. In fact, Claimant had prepared the declarations for his signature. The undersigned finds that Dr. Cohn is not a reliable witness given his willingness to take Claimant's word without any independent investigation of the work site. Further, Dr. Cohn's positive findings on examination of Claimant other than crepitus on shoulder rotation, were based solely on findings within Claimant's control, such as straight leg raising and tenderness to touch. Tests for strength, sensation and reflexes were either not done on most occasions (*see* CX-M, pp.71-74, 76, 81), are unclear by such comments without context as "unchanged" *(see Id*. at 74, 75, 80), or indicate that strength, sensation and reflexes in the upper and lower extremities are "good" *(see Id*. at 78, 79). Having already determined that Claimant is not a credible witness, the Court questions Dr. Cohn's dependence on her recitation of subjective symptoms to make his diagnoses. Finally, Dr. Cohn is a rehabilitation specialist, whereas Drs. Hurley and Pachelli are orthopedists. Based on their credentials, the Court finds that Drs. Hurley and Pachelli have greater expertise than Dr. Cohn about Claimant's orthopedic problems.

For all of the foregoing reasons, this Court finds that Claimant's date of maximum medical improvement is per Dr. Hurley's opinion: February 23, 1993. However, as Claimant did undergo surgery on her right shoulder on December 12, 1999, CX-WW, p.457, she is entitled to a second

period of temporary total disability. As that issue is not before this Court, the undersigned will not determine the term of that period, lacking any evidence to do so. If the parties cannot agree on that period, they may request a hearing before the Office of Administrative Law Judges.

B. Psychological Maximum Medical Improvement

Neither Dr. Traweek nor Dr. Ginzburg specifically testified about the date Claimant reached psychological maximum medical improvement. However, one can infer their opinions from the rest of their testimony and/or reports. Dr. Traweek's reports show a pattern which supports a maximum medical improvement date of October 26, 1999. This is the first date that his treatment note is entitled "Periodic F/U."[30] In addition, prior to that date, the section entitled "Next Visit" would indicate a "standing appointment" with a specific date. See, e.g., CX-UU, pp.433-436. On October 26, 1999, the same section entitled "Next Visit" stated "individual to schedule – @ 1-2 mos." CX-UU, p.437. At the next appointment on November 10, 1999, the same section entitled "Next Visit" stated "individual to schedule – periodic F/U PRN."[31] *Id*. at 438. The intervals of Claimant's visits to Dr. Traweek became wider starting December 31, 1998, when she went from weekly to monthly visits. *Cf*. CX-J to CX-L, p.66. In addition, her GAF reached "70," a number which indicates adequate (rather than impaired) functioning.[32] Dr. Traweek testified that he made quarterly reports until then: "The minute she got better, it extended, because the number of sessions decreased." Based on the foregoing, the undersigned concludes that Dr. Traweek saw major improvement in Claimant's condition as of December 31, 1998, and decided that she needed only periodic follow-up at her own discretion after October 26, 1999. Therefore, it is inferred that Dr. Traweek believed Claimant had reached maximum medical improvement as of October 26, 1999, as his treatment notes and reports support that position.

It is inferred that Dr. Ginzburg did not state an opinion of the date of maximum medical improvement because he does not believe Claimant ever suffered a psychological impairment, i.e., her functioning was consistently within the normal range. Although he did admit that Claimant had a somatoform disorder, it is inferred from Dr. Ginzburg's testimony that he did not believe that this disorder was severe enough to require treatment, and that thus, it was not necessary to consider a date of maximum medical improvement. It is inferred that Respondent would argue that Claimant improved as of October 26, 1999, because her trial in the instant case was over, and therefore problems of a

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[30]According to the reference entitled MEDICAL ABBREVIATIONS, Neil M. Davis Associates, 8th Edition, 1997, "F/U" means "follow-up" (p.104).

[31]"PRN" means "as occasion requires." *Id*. at 206.

[32]See *supra* n.14, for an explanation of the "GAF" scale.

psychological nature diminished after the stress of the litigation decreased.

The undersigned concludes that the preponderant evidence supports Dr. Traweek's inferred position that the date of Claimant's psychological maximum medical improvement is October 26, 1999. As the Court has concluded that Claimant did have a *bona fide* pain disorder which was causally aggravated and accelerated by the October 1990 accident, an apparent improvement in that disorder is documented over the course of treatment by Dr. Traweek. The pattern of improvement begins to level off as of December 31, 1998, and stabilizes completely as of October 26, 1999. Therefore, the evidence supports a date of psychological maximum medical improvement of October 26, 1999.

The above conclusion is not meant to infer that Claimant was ever so psychologically impaired that she could not have continued to work at the job she left at Employer in July 1993. But the undersigned also concludes that Dr. Traweek's treatment is in part responsible for Claimant's adequate level of psychological functioning.

CONCLUSION

Claimant was offered suitable alternate employment. To the extent her workplace needed rearrangement to allow her to work comfortably and without re-injury, Employer made these adjustments. Therefore, Claimant did not resign because she was forced to work outside of her limitations and feared or experienced re-injury. Rather, Claimant voluntarily resigned for a number of reasons that are best summarized as personality conflict with her supervisor and co-workers.

Claimant's psychological disorder is related to her injury of November 6, 1990, and is covered under the Longshore Act. Therefore, Employer is responsible for Section 7 benefits for her psychological care, specifically monies owed to Dr. Traweek.

The date of maximum medical improvement (physical) is February 23, 1993. However, due to surgery performed on December 21, 1999, Claimant entered a new period of temporary total disability which is not the subject of this claim. Therefore, a date of maximum medical improvement after December 21, 1999 has not been determined. Claimant's date of maximum medical improvement for her psychological condition is October 26, 1999.

Employer does not owe Claimant any compensation, given her ability to perform suitable alternate employment at a modified job with Employer at or above the average weekly wage she earned at the time she was injured in 1990. Therefore, Employer owes no Section 14(e) penalties.

ORDER

1. Claimant shall take no monetary compensation.

2. Respondent shall pay Dr. Anthony Traweek all monies owed for psychological services rendered to Claimant from December 16, 1997, to the present, and continuing, less any monies already paid, and not including services rendered in direct support of litigation, i.e., declaration(s) made in support of litigation and/or expert fees.[33]

3. Respondent shall receive credit for all compensation paid to claimant from November 7, 1990 through July, 27, 1993, for a total of $24,216.58.

4. The District Director shall make all calculations necessary to carry out this Order.

5. Respondent shall provide Claimant all medical care that may in the future be reasonable and necessary for the treatment of the sequelae to the injuries to her right shoulder and lower back.

6. Counsel for Claimant is hereby ordered to prepare an Initial Petition for Fees and Costs and directed to serve such petition on the undersigned and on the counsel for Employer within 21 days of the date this Decision and Order is served. Counsel for Employer shall provide the undersigned and Claimant's counsel with a Statement of Objections to the Initial Petition for Fees and Costs within 21 days of the date the Petition for Fees is served. Within ten calendar days after service of the Statement of Objections, counsel for Claimant shall initiate a verbal discussion with counsel for Employer in an effort to amicably resolve as many of Employer's objections as possible. If the two counsel thereby resolve all of their disputes, they shall promptly file a written notification of such agreement. If the parties fail to amicably resolve all of their disputes within 21 days after service of Employer's Statement of Objections, Claimant's counsel shall prepare a Final Application for Fees and Costs which shall summarize any compromises reached during discussion with counsel for

[33]Such fees may be recovered as litigation costs and would ordinarily be included in Claimant's attorney's fees and costs petition, see below, paragraph 6.

Employer, list those matters on which the parties failed to reach agreement, and specifically set forth the final amounts requested as fees and costs. Such Final Application must be served on the undersigned and on counsel for Employer no later than 30 days after service of Employer's Statement of Objections. Within 14 days after service of the Final Application, Employer shall file a Statement of Final Objections and serve a copy on counsel for Claimant. No further pleadings will be accepted, unless specifically authorized in advance. For purposes of this paragraph, a document will be considered to have been served on the date it was mailed. Any failure to object will be deemed a waiver and acquiescence.

ANNE BEYTIN TORKINGTON
Administrative Law Judge

San Francisco, California